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MONTANA PROSECUTOR

November, 1977 Volume 1, No. 7

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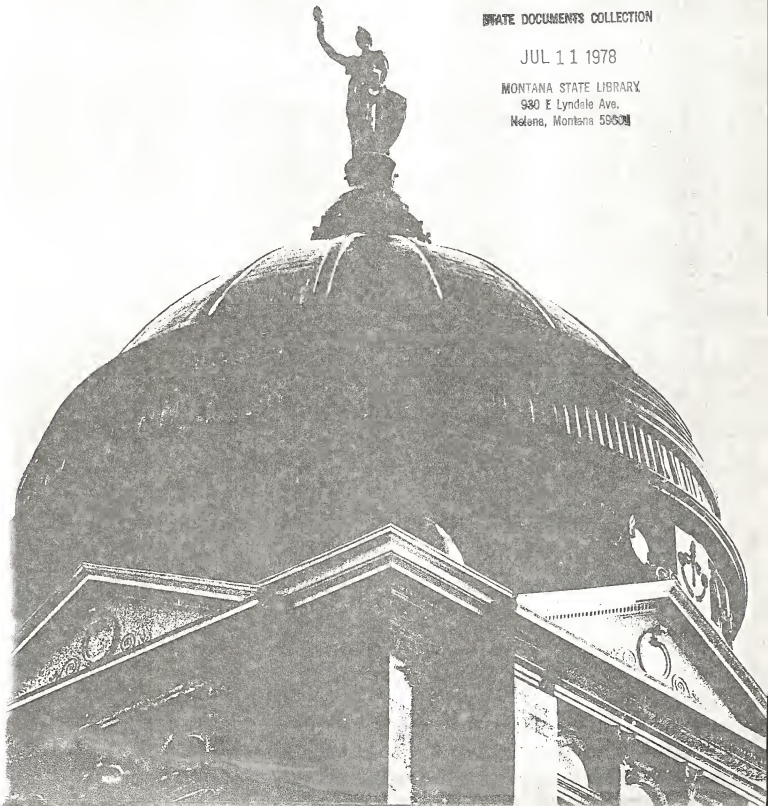


INTRODUCTORY NOTES

The grant for the in-state prosecutor training seminar in Billings on December 8, and 9, 1977 at the Holiday Inn West has been approved by the MBCC. The seminar will be held in Billings in conjunction with the fall business meeting which will take place Saturday morning, December 10, 1977. The agenda for the business meeting has not been firmed up as of this date. The schedule of events for the training seminar, which will emphasize Rape and Homicide is as follows:

Thursday - December 8, 1977

9:00 a.m.	Film - "Rape, A Preventive Inquiry."
9:30 a.m.	The Rapist and His Victim
10:30 a.m.	Break
10:45 a.m.	The Prosecutor's Official Response - Ossie Brown - East Baton Rouge District Attorney
12:00 a.m.	Lunch
1:30 p.m.	Medical Aspects of Sex Offenses - Charles Petty - Medical Examiner, Dallas County, Texas
3:00 p.m.	Break
3:15 p.m.	Role of the Pathologist in Homicide Investigation - Charles Petty
5:00 p.m.	Training Ends

Friday - December 9, 1977

9:00 a.m.	Crime Scene and Follow Up Investigations - Lt. Haguethorpe, Los Angeles Sheriff's Office
10:30 a.m.	Break
10:45 a.m.	Case Preparation - Steve Neely, County Attorney, Tucson, Arizona
12:00 a.m.	Lunch
1:30 p.m.	The State's Case - A General Overview - Steve Neely and Ossie Brown
3:00 p.m.	Break
3:15 p.m.	The State's Case (cont.)
5:00 p.m.	Training Ends

Saturday - December 10, 1977

9:00 a.m.	Business meeting

All county attorneys and their deputies are encouraged to attend. A substantial amount of money is being invested by the MBCC to provide this valuable in-state training that was previously available only to those few prosecutors who attended out-of-state seminars. Whether such projects will be funded in the future depends, to a considerable degree, upon whether Montana prosecutors take advantage of the training available. Additionally, as the program of events indicates, the seminar is expected to be professionally challenging and rewarding. As a result, attendance of all county attorneys and their deputies is encouraged

Reservation requests for the seminar are being sent out and must be returned to the Holiday Inn West by November 22, 1977.

INTRODUCTION (cont.)

Also contained in this issue is a suggested method of proceeding in bad check cases for those offices who do not have such a procedure or would like to adapt some of the forms enclosed to their own procedure.

Finally, another sample investigative subpoena, used by the Yellowstone County Attorney's Office is enclosed for consideration.

RECENT CASES

TESTIMONY ABOUT DEFENDANT'S SILENCE WAS ADMISSIBLE

In Doyle v. Ohio, 426 U.S. 610 (1976), the Supreme Court held inadmissible any testimony about an accused's silence after receiving his Miranda rights at the time of arrest. The eighth circuit has concluded that in circumstances where a defendant waived his Miranda rights, gave the police false information and then remained silent when confronted with the falsehood, an officer may testify about the defendant's silence. U.S. v. Mitchell, 21 Cr.L. 2424 (7-27-77).

The day after his arrest the defendant signed a waiver of his Miranda rights and submitted to questioning. He remained silent, however, when an officer confronted him with the falsity of the statements he had made, and the officer was permitted to testify about this silence on the part of the defendant. In upholding this result, the court noted that false exculpatory statements are admissible as tending to indicate guilt. The defendant's silence when confronted with the falsity of his statements served to support the same inference, according to the court.

In Doyle, the Supreme Court emphasized that the post-arrest silence of a defendant following Miranda warnings is ambiguous. The eighth circuit distinguished Doyle on the grounds that here the defendant had voluntarily waived his Miranda rights and made statements to the police.

CRIMES - HOMICIDE - ASSAULT - WEAPONS

Defendant-appellant was found guilty by a jury of carrying a revolver without a permit or license to do so. Defendant appealed the judgment on grounds that inasmuch as HRS sections 134-6 and 134-9 prescribe different degrees of punishment for the same conduct committed under the same circumstances by similarly situated persons, his conviction and entry of judgment against him pursuant to the terms of HRS section 134-9 violated his rights to due process of law and the equal protection of the laws.

The Supreme Court ruled that where the same act committed under the same circumstances is punishable either as a felony or as a misdemeanor, under either of two statutory provisions, and the elements of proof essential to either conviction are exactly the same, a conviction under the felony statute would constitute a violation of defendant's right to due process and the equal protection of the law. State v. Modica, HawSupCt (August 4, 1977)

MOTION FOR ACQUITTAL

Defendant-appellant was found guilty of promoting a dangerous drug in the second degree. Appellant contends that the trial court erred when it denied appellant's motion for judgement of acquittal.

The Supreme Court ruled that under a motion for a judgment of acquittal made at the close of all of the evidence, that appellant court will consider the evidence adduced in the trial court in its strongest light for the state in passing on the legal sufficiency to support a conviction. Where there is substantial evidence in the record, albeit circumstantial, from which justifiable inferences of fact may be drawn on the factual issue of unlawfulness, such issue is a question for the jury to determine. State v. Kelsey, HawSupCt (Doc. No. 6015, July 25, 1977)

DEFENSE OF DURESS

After an exhaustive examination of the common law, the New Jersey Supreme Court decides to abandon the requirement that a defendant claiming a defense of duress demonstrate that he acted under the threat of "present, imminent and impending" harm. Henceforth, the court declares, duress may be raised as a defense to a crime other than murder if "the defendant engaged in conduct because he was coerced to do so by use of, or threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist."

However, the court adds, the defendant bears the burden of providing sufficient evidence to satisfy the trial judge that duress is an issue, and he must establish the defense by a preponderance of the evidence. To avoid confusion, the trial judge should also instruct the jury that the prosecution must prove all other elements of the crime and disprove any other defenses beyond a reasonable doubt. State v. Toscano; NJSupCt, 6/27/77; 21 CrL 2369.

DEFENSE OF NECESSITY

The defendants were indicted and convicted by a jury of the crime of escape in the second degree. They appeal from the judgment and sentence based on the necessity to escape due to imminent danger of serious bodily injury in the prison.

The Supreme Court ruled that the defense of necessity in escape situations is available to the accused when specific and articulate conditions within the prison exist which seriously expose the prisoner to severe injury. There must be some support in the evidence that the danger existed, that the defendant was vulnerably exposed to the danger, and that the threatened harm to him was imminent. Whether the threat of harm was imminent and whether the defendant was reasonable in his assessment of the situation and in acting as he did are to be determined from the facts and circumstances of the particular case. State v. Horn, Ortiz, and Wakinekona, HawSupCt (August 5, 1977).

SEARCH WARRANTS: PROBABLE CAUSE: ANTICIPATORY SEARCH WARRANTS

A court approved an anticipatory search warrant, issued while cocoa leaves were mailed from a South American country and were still in the possession of postal authorities and not yet delivered to the intended recipient. This question of the validity of an anticipitory warrant was one of first impression in the State. "There is no particular consitutional infirmity in the mere fact that a warrant is sought to search for contraband which has not as yet reached the destination described herein. The test of constitutional validity is simply whether the search is reasonable under such circumstances in view of the probable cause that a crime is being committed, as demonstrated by the proofs underlying the issuance of the warrant . . . Where the proof of the prior curcumstances demonstrated that there is a strong probability that the continuation of the process already initiated by the shipment of the contraband will in the natural course of events result in the consummation of the crime at the time and place anticipated, the issuance of the warrant is legally justified." The Court also found nothing inherently unfair or violative of public policy so as to dictate a contrary conclusion merely because the contraband was in the possession of the postal authorities at the time of the application for the warrant. Such warrants have been sustained in other jurisidictions, including New York and California and some federal courts, and the authorities are collected in the opinion. (State v. Mier, 370 A.2d 515, N.J. App., 1977).

SEARCH WARRANTS: PROBABLE CAUSE: INFORMANT'S TIP; CRIMINAL REPUTATION OF DEFENDANT

Where an informant's tip was insufficient to establish probable cause for the issuance of a search warrant because of the failure to disclose the circumstances from which the informant concluded that criminal activity was taking place, and the conduct of the defendant observed by the police was as consistent with innocent activity as it was with criminal activity, defendant's criminal reputation alone could not elevate these activities to the level of probable cause for issuance of the search warrant. The Court considered the crucial element in the consideration of probable cause to be the police observation. "Since the observed activities, the inforceptible of an interpretation of innocent activity, the informant's tip and the defendant's reputation should not be allowed to elevate these activities to the level of probable cause. To do so would be to declare that everytime the police received an informant's tip that a 'known criminal' is going to a particular location for criminal purposes, police observations of 'suspicious conduct' of the suspect at that location give rise to probable cause for a search . . . We simply hold that when the police rely on an informant who has failed to disclose any of the circumstances from which he concluded that criminal activities are taking place, more is necessary than the defendant's reputation and the police observations in this case to support a finding of probable cause." (People v. Wirchanski, 359 N.E. 2d 666, N.Y., 1977).

WARRANTLESS SEARCH: PROBABLE CAUSE; MARIJUANA; SMELL

Testimony that an officer smelled a strong odor of marijuana was sufficient to furnish probable cause to search a vehicle without a warrant. The great majority of courts which have passed upon this issue have held that the smell of marijuana alone is sufficient to furnish probable cause to search a vehicle without a warrant, at least where there is sufficient foundation as to expertise by the police officer. Several cases are cited in the instant opinion (State v. Benson, 251 N.W. 2d 659, Neb., 1977.)

The "very faint" odor of marijuana detected by an arresting officer who initially stopped defendant's automobile for a speeding violation trunk even though another officer at the scene was unable to verify any such odor (State v. Zamora, 559 P.2d 195, Ariz. App., 1977).

STOP AND FRISK: REASONABLE SUSPICION; NARCOTICS OFFENSES

Where a police officer observed defendant holding a small manila envelope in one hand and a small piece of white paper in the other, and defendant appeared to be preparing to roll a cigarette, and the officer had prior experience with marijuana arrest, an initial request that defendant pull his car over and stop was both reasonable and legally justified. Where the officer then smelled marijuana and noticed an "un-uniformed" shaped cigarette, he had probable cause to arrest the defendant. (Thompson v. United Stateds, 368 A.2d 1148, D.C. 1977).

"Oh, I'm not studying anything. I just read for escape."

WARRANTLESS SEARCH: PROBABLE CAUSE; EXIGENT CIRCUMSTANCES; INVESTIGATION OF ARSON

Where fire officials, during the course of fighting a fire, lawfully discovered evidence of arson that would establish probable cause for the issuance of a search warrant for the premises, a subsequent warrantless search of the premises by the fire officials conducted hours, and days, after the fire was put out was improper and the evidence discovered in the post-fire searches was ruled inadmissible. The Court laid down the following rules to be used in post-fire investigations by fire officials: "If there has been a fire, the blaze extinguised and the firefighters have left the premises a warrant is required to reenter and search the premises, unless there is consent or the premises have been abandoned.[par.] The standard of probable cause will vary depending on the nature of the post-fire search. If the authorities are seeking evidence to be used in a criminal prosecution, the usual standard (probable cause to believe that evidence of a crime will be found) will apply. Where the cause is undetermined, and the purpose of the investigation is to determine the cause and to prevent such fires from occurring or recurring, an administrative search may be conducted pursuant to a warrant issued in accordance with reasonable legislative or administrative standards or, absent their promulgation, judicially prescribed standards; if evidence of wrongdoing is discovered, it may, of course, be used to establish probable cause for the issuance of a criminal investigative search warrant or in a prosecution." If, of course, there are exigent circumstances, such as a reason to believe that a destruction of evidence is imminent or that a further entrance of the premises is necessary to prevent a recurrence of that fire, a warrant would not be required. The Court makes it clear that the exigent circumstances exception will not justify a search of such premises after the emergency has passed. (People v. Tyler, 250 N.W. 2d 467, Mich, 1977).

SEARCH WARRANTS: EXECUTION; SWALLOWING EVIDENCE; REASONABLENESS

Where police officer had a search warrant they could use reasonable force to prevent the defendant from swallowing the evidence consisting of balloons of heroin. A defendant has no constitutional right to destroy or dispose of evidence by swallowing it. In the instant case, however, the process undertaken by the police went beyond reasonableness standards where the defendant did not resist beyond refusing briefly to spit out the balloons of heroin which he had concealed in his mouth and the officers immediately pinned him to a couch, with one officer pinching his nose and spreading his mouth open while another officer placed his hands around defendant's throat, effectively preventing defendant's Adam's apple from moving, with the result that defendant had extreme difficulty in breathing, notwithstanding that he was choked for only thirty to sixty seconds. The Court stated: "We subscribe to the view that it is constitutionally reasonable for the police to place their hands on a suspect's throat to prevent the swallowing of evidence, as long as they do not 'choke' him, i.e., prevent him from breathing or obstruct the blood supply to his head." The Court chose to follow a line of California decisions to the effect that the police may not "choke" a suspect to prevent him from swallowing evidence. However, other jurisdictions have allowed "choking" or "grabbing" the defendant by the throat in order to obtain evidence. (State v. Williams, 560 P.2d 1160, Wash. App., 1977).

NARCOTICS: MARIJUANA; PRIVATE POSSESSION

The Supreme Court of Florida has made it clear that private possession of marijuana in the home is not constitutionally protected. According to the Court, there is no fundamental right to smoke marijuana (Laird V. State, 342 So. 2d 962, Fla., 1977)

IDENTIFICATION EVIDENCE: BITE MARKS; ADMISSIBILITY OF TOOTH IMPRESSIONS

Although the evidence comparing marks in human tissue and the teeth of a defendant was considered to have limited application in the courts, since the method for making such comparison consisted of standardized procedures known to procure accurate models and measurements, it was held to be admissible. A forensic odontist, who was an expert in relating bite marks and tooth impressions to the teeth that made them, was properly permitted to express his opinion that the bite mark found upon the victim had been inflicted by the defendant. The expert witness was a graduate dentist with 38 years of practice and teaching experience and had attended 12 ot 15 lectures and read 30 to 40 articles upon the subject by others experienced in the field. The Court ruled that he was qualified as an expert even though this was the first time he had testified on the subject. (Niehaus v. State, 359 N.E. 2d 513, Ill., 1977).

RECORDS: BANK RECORDS; CONFIDENTIALITY; CALIFORNIA; RETROACTIVITY

In Burrows v. Superior Court, 529 P.2d 590 (1974), the Supreme Court of California held that a bank depositor has a reasonable expectation that his bank will maintain the confidentiality of records which originate with him, and that the bank's voluntary surrender of such records to the police without the aid of any legal process constitutes an illegal search and seizure. In People v. Kaanehe, 559 P.2d 1028, Cal., 1977, the Court has held that Burrows applies only to records seized after the date such decision became final.

TELECOMMUNICATIONS: TAPE RECORDING TELEPHONE CALL TO POLICE DEPARTMENT; PRIVATE COMMUNICATIONS

Under a statute (RCWA 9.73.030(1)) prohibiting subdivisions of the State from recording "private communications" between individuals without the consent of all parties to the conversation, a telephone call made by the defendant to a police department immediately after the commission of a crime was a "private communication" and was not admissible at his trial. (State v. Wanrow, 559 P.2d 548, Wash., 1977).

AUTOMATISM: INSTRUCTIONS

An intermediate appellate court in Illinois, in a case of first impression for that State, has ruled that a defendant who raised a defense of involuntary action, or automatism, is entitled to an instruction specifically dealing with that defense, and an instruction dealing with insanity in lieu of such a specific instruction, will not suffice. The Court notes that an involuntary action or automatism defense consists of a single element, lack of volition, and is to be distinguished from an insanity defense which consists of three elements. The Court ruled that in the interest of justice a reversal of a conviction for aggravated battery and obstructing a police officer was required where the jury instructions were substantially defective because they did not contain an instruction on the defense of involuntary conduct, even though such an issue was presented as to whether defendant's actions during a psychomotor epileptic seizure were actions of a sane person or merely involuntary or automatic actions of a sane person. (People v. Grant 360 N.E. 2d 809, Ill.App., 1977).

WITNESS: RIGHT OF CONFRONTATION AND CROSS-EXAMINATION; USE OF PRELIMINARY HEARING TRANSCRIPT; PREGNANCY

It has been held that the pregnancy of a prosecution witness and imminent birth of her child, coupled with a doctor's order not to testify at trial, constituted a sufficient showing of unavailability to justify a trial judge in permitting the testimony of the witness at the preliminary hearing to be read at trial. The Court ruled that pregnancy and imminent birth are equivalent to sickness or death or being without the jurisdiction, for purposes of proving the unavailability of the witness. (Lamb v. State, 560 P.2d 383, Okla., 1977)

DEFENDANT AS WITNESS: CROSS-EXAMINATION; IMPEACHMENT; PRIOR CONVICTION; MOTION FOR NEW TRIAL

The Supreme Court of Colorado has ruled that a defendant's prior conviction can be used for impeachment purposes even though the defendant has not yet been sentenced on the convictions, where there has been a motion for a new trial on the convictions that has been denied. The Court notes that there is ample authority from other jurisdictions for the proposition that a felony conviction, after denial of the motion for a new trial, but prior to sentencing, may, nonetheless, be used for impeachment purposes (People v. Johnson, 560 P.2d 465, Colo., 1977).

PROBATION: CONDITIONS; REHABILITATION; RIGHT TO TREATMENT

The Court of Appeals of Washington has held that a defendant who is placed on probation on condition that he have individualized rehabilitative treatment, has neither a statutory nor a constitutional right to such treatment at state expense. (State v. Damon, 559 P.2d 1365, Wash. App., 1977).

SENTENCE: IMPOSITION; DIFFERENT JUDGE

It has been held that no error occurred in a case where defendant was convicted before one trial judge, but sentenced by a different trial judge, the latter being fully informed of the usual materials available to a judge for consideration in the sentencing process. The trial judge was a visiting, retired judge who was sitting by special designation. Since sentencing did not take place immediately after the close of the trial, this judge returned to his home and indicated that he did not plan to return for sentencing. The instant Court holds that a state criminal defendant has no federal constitutional right to be sentenced by his trial judge. (U.S. Ex Rel. Fields v. Fitzpatrick, 548 F.2d 105, 3rd Cir., 1977).

PROBATION: CONDITIONS; REIMBURSEMENT FOR ASSIGNED COUNSEL

Under provision of a statute pertaining to probation (I.C.A. sections 789 A.1, 789 A.1, subd. 2) permitting a sentencing court to impose probation provisions "upon such terms and conditions as it may require", a trial court could require, as a condition of probation, that a defendant repay the county for the fees of assigned counsel on a reasonable installment basis. Such was well within the intent of the legislature to "provide maximum opportunity for the rehabilitation of the defendant and protection of the community from further offenses by the defendant and others." This Court approves the broad grant of authorization in probation statutes which permit the exercise of wide latitude of judicial judgment in imposing probation conditions. This conforms to the philosophy of A.B.A. Standards Relating to Probation, Section 3.2, at 44 (Approved Draft, 1970), which provides, "[n]o other conditions should be required by statute; but the sentencing court should be authorized to prescribe additional conditions to fit the circumstances of each case." (State v. Rogers, 251 N.W. 2d 239, Iowa, 1977).

THE GUILTY PLEA; VOLUNTARINESS; PLEA BARGAINING; ALASKA

Plea bargaining between prosecution and defense, while a recognized and accepted practice in many parts of the United States, is now contrary to the policies of the Alaska Attorney General. Since August of 1975 the Attorney General has instituted a policy which purports, in its general outlines, to prohibit all state prosecutors from sentence bargaining and also, for the most part, charge bargaining. In the instant case the Supreme Court of Alaska held that henceforth trial judges shall be totally barred from engaging in either charge or sentencing bargaining. The Court approved issuance of a writ of prohibition enjoining a judge who had engaged in the plea bargaining process with the defendant from passing sentence on the defendant and remanded the case with instructions to assign the case to another trial judge. (State v. Buckalew, 561 P.2d 289, Alaska, 1977).

THE GUILTY PLEA; VOLUNTARINESS; THE PLEA BARGAIN; DEADLINE; JUDICIAL DISCRETION

Strict enforcement of a deadline fixed by a trial court for plea negotiations and refusal to allow defendants to change their not guilty pleas to guilty one day after the deadline had passed, was approved in United States v. Ellis, 547 F.2d 863, 5th Cir., 1977. The Court followed the precedent set by United States v. Parkerson, 529 F.2d 1031, 5th Cir., 1976. Parkerson did not have a published opinion but the trial judge in Parkerson had reasoned that strict adherence to such a deadline was necessary for proper scheduling of cases and to save time, difficulty and expense to jurors and witnesses who would otherwise have to be summoned needlessly to attend court sessions. In addition, it was reasoned that the United States Attorney was overworked or under staffed and the judge concluded that if he varied from his deadline because of the United States Attorney's workload, he would also have to consider variations for defense counsel similarly situated, with the result that the deadline would become meaningless. The instant Court approved this reasoning and concluded that deference due the prosecutorial prerogative and the rights of the defendant under federal Rule of Criminal Procedure 11 was outweighed by judicial discretion to control the scheduling of effective utilization of jurors and witnesses. The instant Court declined to weigh other possible considerations.

PROBATION - CONDITIONS - SEARCH AND SEIZURE

Two years ago a panel of the Michigan Court of Appeals found unconstitutional a probation condition requiring the defendant to submit his person, residence and effects to warrantless searches by his probation officer at any time. People v. Peterson, 62 Mich. App. 258, 233 NW2d 250, 18 CrL 2107 (1975). Finding Judge Danhof's dissent in that case "better reasoned" a majority of a different panel now finds no constitutional barrier to the inclusion in a probation order of a condition providing as follows: "Respondent shall voluntarily consent that any police officer or probation officer may at any time search him personally, his portion of the home in which he resides, or the vehicle which he may be operating and may take urinalysis or blood test of him for the purpose of ascertaining whether or not he is violating any law or term of probation, and shall carry such consent on his person and shall exhibit it to any police officer or any probation officer at any time requested in good faith and not for harrassment." Judge Kaufman, dissenting, "would hold that the part of the probation order relating to warrantless searches must be vacated and held for naught for the reasons carefully outlined by Judge O'Hara in the majority opinion in People v. Peterson." (People v. Richards; Mich. Ct.App., 7/11/77, released 8/26/77)

CHILD MOLESTING RELATED TO CHILD PORNOGRAPHY

A report issued by the California Attorney General's Advisory Committee on Obscenity and Pornography concludes that child molesting may be directly related to the increase in pornography using children as subjects. The report, detailed in the August 1977 issue of Prosecutor's Brief, reveals that "Los Angeles Police Department officials found pornographic literature, often depicting children, in every case of child molesting investigated during a five month sample period." The report also pointed out that "one child molester carried a brief case of pornographic magazines depicting sexual acts between children and adults, a supply of lollipops and small dolls, and a tube of petroleum jelly."

The report makes specific recommendations directed at stricter enforcement and drafting of legislation while noting that 30,000 juveniles are exploited annually in Los Angeles alone. There are 280 bookstores and nearly 30 mail order houses that sell child pornographic materials in California. The report also notes that profit on child pornography is four to five times greater than on regular porno.

Efforts are also being made in Washington to curb child pornography. Dr. Judianne Densen-Gerber, a New York psychiatrist, recently testified before the House Judiciary Subcommittee on crime that "not only are the children who pose for such pictures hurt, but those who buy the publications are encouraged to act out their own fantasies and abuse their own children." "There is nothing good about this," she said," No First Amendment good can I possibly see in telling a man to go home and have intercourse with his 9-year-old daughter." Dr. Densen-Gerber estimated that there are more than one million pre-teen children involved in pornography and prostitution and 264 different magazines published monthly depicting child pornography.

PUNISHMENT: CRUEL AND UNUSUAL

While punishment of the felon is often cruel to his family, only the felon is constitutionally protected. McKellar v. Ariz. State Dept. of Corrections (Ariz.) 566 P.2d 1337.

DOUBLE PUNISHMENT

Prohibition against multiple punishment for crimes arising out of a single behavioral incident did not bar imposition of three consecutive sentences where defendant fired some 20 shots at three separate victims. State v. Briggs (Minn.) 256 N.W. 2d 305.

PROBATION CONDITIONS

Unless the probation conditions imposed violate basic fundamental rights or bear no relationship to the purpose of giving probation instead of prison, the discretion of the trial court in imposing the conditions will not be disturbed, since probation is a form of punishment, and defendant could always ask for prison if he felt the conditions were too harsh. The Court went on to hold that consent to search as a probation condition was not constitutionally overbroad. State v. Montgomery (Ariz.) 566 P.2d 1329.

APPEAL

Where defendant had not filed brief within time limitation, and was informed just after period to file had begun to run, that his attorney had been suspended from practice and was advised to get another attorney and did not, and did not show any reason for his failure to request counsel, defendant's appeal properly dismissed. State v. Paulson (N.D.) 256 N.W.2d 556.

ARREST

Where a grave offense had been committed, where the suspect is reasonably believed to be armed, where probable cause to arrest is clear, and where there is strong reason to believe suspect is in premises being entered, and where there is a likli-hood suspect will escape if not swiftly apprehended, sufficient exigent circumstances were shown to allow police to make forcible, day-time entry of defendant's apartment to arrest defendant, and evidence seized subsequent to search incident to arrest was admissible. People v. Denwiddie (Ill.App.) 365 N.E.2d 978.

BRUTON RULE

Where state made motion for separate trial for purpose of being able to use defendant's statements and did not know for sure, at time of motion, that defendant would testify and expose himself to cross-examination, court did not abuse discretion in granting separate trial. State v. McLucas (Conn.) 375 A.2d 1014.

CONSPIRACY

Once the existence of a conspiracy is established, only slight evidence is required to connect any given defendant with it, so where the existence of the conspiracy is not challenged, there need only be slight evidence showing defendant's connection with it. United States v. Valdovinos (9th Cir.) 558 F.2d 531.

DWI

Evidence of the defendant sitting behind the wheel with a woman on his lap, then sliding over to the passenger side was sufficient to prove either DWI or DWI actual physical control. A footnote notes that appellant could be convicted of actual physical control under these facts where he apparently had been in control of the vehicle even though not driving it. State v. Chapple (Idaho) 567 P.2d 20.

HEARSAY

Detective's testimony about a tip, which he received prior to events in question and which led to such events and the prosecution, was admissible, in view of fact that it was not hearsay because it was offered only to show the effect of the tip on the detective. State v. Williams (Iowa) 256 N.W.2d 207.

PRIOR BAD ACTS

Court erred in admitting tape recordings of telephone conversations which referred to prior offenses of defendant, where such references did not tend to prove motive, intent, absence of mistake, common scheme, or system of criminal activity, or identity of defendant. State V. Powell (Iowa) 256 N.W.2d 235

RAPE - CONSENT

While consent always involves submission, submission does not always mean consent, and the resistance necessary for the crime to constitute rape must be considered in light of all the circumstances. The lack of visible weapons, threats, striking the victim, and the victim not resisting as much as she could did not constitute consent, where the teenage babysitter had observed the drunk appellant quarrel with the woman she was babysitting for, then was driven late at night to a location several miles from her home, appellant forced her back and forced her legs down and apart, and her first statement upon exiting the vehicle was that she had been raped. Tryon v. State (Wo.) 567 P.2d 290.

STOP

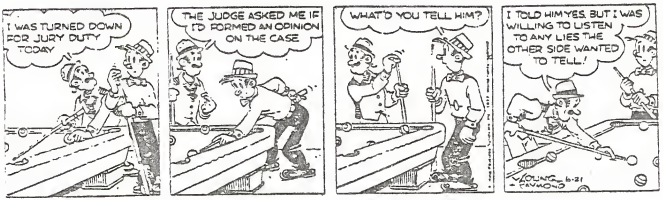
An officer attempting to make an investigatory detention may properly display some force when it becomes apparent that an individual will not otherwise comply with his request to stop, and the use of such force does not transform a proper stop into an arrest. United States v. Thompson (9th Cir.) 558 F.2d 522.

INFORMANT - DISCLOSURE INFORMANT

Since the informant had been within the apartment within 48 hours, and appellant couldn't call the other occupants should the identity of the informant have been disclosed? RULING: No. No showing was made that the informant could testify about who possessed the drugs, therefore not disclosing him was proper. State v. Bohn, Ariz, Sup.Ct. No. 3649, September 22, 1977.

INFORMANT - DISCLOSURE - MATERIAL FACTS

Should the informant have been disclosed since trial testimony indicated the informant was at the scene when the search warrant was served? RULING: No. While there is no privilege of non-disclosure. if the informant witnessed criminal acts or knew material facts on the issue of guilt, appellant doesn't suggest the informant could establish who owned or possessed the heroin, or show how he was prejudiced. Therefore the informant was not a material witness and non-disclosure was proper. State v. Altamirano, Sup.Ct. No. 3739, September 13, 1977.


I WAS TURNED DOWN FOR JURY DUTY TODAY
THE JUDGE ASKED ME IF I'D FORMED AN OPINION ON THE CASE
WHAT'D YOU TELL HIM?
I TOLD HIM YES. BUT I WAS WILLING TO LISTEN TO ANY LIES THE OTHER SIDE WANTED TO TELL!

RIGHT OF CONFRONTATION

Testimony of state's toxicologist who gave opinion that material seized from defendant was marijuana did not violate defendant's right to confrontation even though tests conducted on material were done by another chemist where toxicologist could reasonably rely of test results and laboratory procedures required him to direct test by chemist and his opinion was based upon first hand knowledge of the material as well as his official opinion of routine test results, and where defendant had full opportunity to cross-examine witness. State v. Reardon (Conn.) 376 A.2d 65.

SEARCH AND SEIZURE

Where defendant, who was arrested for DWI, had made arrangements for his family to drive away his vehicle, police impoundment was unreasonable, and subequent inventory search and seizure evidence was inadmissible. State v. Goodrich (Minn.) 256 N.W.2d 506

Fact that house at address for which warrant was secured consisted of two apartments did not invalidate a search warrant where the house was apparently a one unit dwelling, and the narcotics came from appellant's part of the premises only. Good citations. United States v. Davis (8th Cir.) 557 F.2d 1239.

VOLUNTARINESS OF STATEMENT

Evidence obtained in violation of Fifth Amendment is admissible in probation revocation proceedings if evidence is otherwise trustworthy, and in the absence of circumstances where defendant was deprived of his free choice to admit, deny, or refuse to answer, confession was not rendered inadmissible by reason of being untrustworthy because of psychological coercion. People v. Peterson (Ill.App.) 365 N.E.2d 1172.

WOLFF REPORTS ON COCAINE AVALANCHE

Members of the House Committee on Narcotics reported that smuggling of cocaine into the United States from South America is reaching avalanche proportions.

Chairman Lester L. Wolff (D-NY), reporting findings of an August visit to seven South American countries, estimated that more than 200 tons of cocaine are being shipped annually from Peru and Bolivia alone, with possibly 160 tons reaching illicit markets in the U.S. and Europe.

BAD CHECK PROCEDURE

(1) Fill out a bad check information sheet. Copies are available at the Sheriff's Office or County Attorneys Office. Write the "violator" a letter advising him or her of the check being dishonored by the bank. This letter must give 5 days notice and advise the "violator" that he or she should/can pick the check up by making restitution. The letter must be sent by either certified or registered mail, return receipt requested.

(2) At the end of the 5-day period, if payment is not received, the bad check information sheet, a carbon copy of the letter, the original check, and the return receipt are brought to the County Attorney's Office.

(3) The County Attorney prepares an affidavit for the complainant to sign before a notary.

(4) The complainant, together with the affidavit, check, letter, receipt, etc., is sent to the police department or sheriff's office for an official complaint to be made. After this is done, the complainant is sent to the office of the justice of the peace to sign the affidavit and complaint and the warrant is then issued. (The procedure may be slightly different is some counties.)

(5) Once an arrest is made by law enforcement officers, the charges may not be dropped. If restitution is made by the "violator" before he or she is physically arrested, dismissal of charges may be requested.

(6) The original check is usually returned to the complainant/ violator after the charges are disposed of.

BAD CHECK INFORMATION SHEET

Date_____
Firm Name_____ Phone No._____
Your Name_____ Position_____

Date check was taken_____
What was check taken in payment of_____
Name of employee who took check_____
Address_____ Phone No._____
Physical description of person who passed check:
Name_____ Address_____
Age_____ Height_____ Sex_____
Weight_____ Eyes_____ Build_____
Hair_____ Marks/scars_____ Clothing_____
Other_____

Identification taken Yes ☐ No ☐
If so, state it's type, (social security card, Montana driver's license, etc.) and number_____

Name of bank check was drawn on_____
If NSF was check run through twice_____
Check appropriate box ifeither of the following apply:

☐ Merchandise obtained by means of check has been returned.

☐ Partial or full restitution has been made on the check.

If complaint is drawn, who will sign as complaining witness?
_____.
Have you had any previous dealings with the person who passed the check?_____, Explain_____
Has demand letter been sent and certified mail card returned?

☐ Yes ☐ No

OTHER COMMENTS:_____

NOTICE OF RETURNED CHECK

To_____ Date_____19___
(Name)

_____
(Address)

_____
You Are Hereby Notified
That a check given by you to us and or cashed by us for you dated

_____, 19___, for $_____ Drawn on_____
(Amount) (Name of Bank)

of _____ Signed by_____
(city) (State) (Name of Maker)
has been presented to the bank for payment and has been returned to

us unpaid for the following reason_____.
(Reason)
Please call upon us and pay the amount of this check without delay.

_____

_____ (This is your 5 day legal notice)

Postal orders for the amount will be accepted.

SUMMARY OF STATE BAD CHECK LAW

The following summary printed on the notice of a returned check is not intended to charge any violation of any provision of the criminal code of this state. All we know is that the check was not paid. All other facts are known to you.

(1) A person commits the offense of issuing a bad check when, with the purpose of obtaining control over property or to secure property, labor or services of another, he issues or delivers a check or other order upon a real or fictitious depository for the payment of money, knowing that it will not be paid by the depository.

(2) If the offender has an account with the depository, failure to make good the check or other order within five (5) days after written notice of nonpayment has been received by the issuer is prima facie evidence that he knew that it would not be paid by the depository.

(3) A person convicted of issuing a bad check shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both. If the offender has engaged in issuing bad checks which are part of a common scheme, or if the value of any property, labor or services obtained, or attempted to be obtained exceeds one hundred fifty dollars ($150), he shall be imprisoned in the state prison for any term not to exceed ten (10) years.

AFFIDAVIT OF PROBABLE CAUSE

State of Montana

County of_____

I,_____do solemnly swear that

_____did, on or about the____day of

_____, 19__, commit the offense of issuing a bad check in

violation of section 94-6-309, R.C.M., 1947.

On the date stated above_____signed a check in

the amount of $_____payable to_____

drawn on the account of_____ Bank of

_____Montana.

The check was accepted by_____in behalf of

the payee and such person can identify_____

as having signed the check.

The check was given by the drawer in payment for goods and for services, and was not given as payment on a preexisting debt. The check was accepted with the express or implied understanding that it was good. The check was not post dated, the payee was not asked and did not agree to hold the check until a later date, and the drawer did not state or imply that the check would not be honored at the bank.
At least 5 days ago the drawer was notified that the check was not honored by the bank, and no part of the check has been paid. I understand that criminal charges will be filed as a result of my signing this Affidavit, and_____will be arrested. If there is a trial I will testify on behalf of the State of Montana.

_____
Affiant

Sworn to and subscribed before me this____day of _____, 19__.

_____
Notary Public

IN THE DISTRICT COURT OF THE THIRTEENTH

JUDICIAL DISTRICT OF THE STATE OF MONTANA

IN AND FOR THE COUNTY OF YELLOWSTONE

IN THE MATTER OF THE INVESTIGATION INTO THE DEATH OF

No. _____

INVESTIGATIVE SUBPOENA

THE STATE OF MONTANA TO: _____

_____

_____

WHEREAS the Yellowstone County Attorney has heretofore filed an affidavit with this Court showing that he has a duty to investigate alleged unlawful activity in the above entitled criminal cause, and

WHEREAS it appearing from said affidavit that information presently held by you may be necessary and proper to the investigation of said unlawful activity, and

WHEREAS the Court finds that the administration of justice requires an investigative subpoena to be issued,

YOU ARE COMMANDED to appear and attend before the County Attorney of Yellowstone County, Montana, in Room _____, Yellowstone County Courthouse, at Billings, Montana, on the _____ day of _____, 197_, at _____ o'clock __. M. then and there to give testimony under oath. Failure to obey this subpoena will be punished as contempt of Court.

Given under my hand and the seal of said Court, this _____ day of _____, 197_.

HARDIN E. TODD, Clerk.

(Court Seal)

By _____
Deputy Clerk.

SHERIFF'S OFFICE)
State of Montana)ss.
County of Yellowstone)

I HEREBY CERTIFY that I received the within Investigative Subpoena on the _____ day of _____, 197__, and personally served the same on the _____ day of _____, 197__, on:

_____

_____

by showing said Subpoena to and delivering to said person(s) a true copy of the same in the County of Yellowstone, State of Montana.

Billings, Montana _____, 197__.
DEAN S. BETZER, Sheriff,

By _____
Deputy Sheriff.